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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 55

THE PEP BOYS, MANNY, MOE & JACK OF CALIFORNIA,

Appellants,

vs.

PYROIL SALES COMPANY, INC.,

Appellees.

APPELLEE'S BRIEF.

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No. 55.

THE PEP BOYS, MANNY, MOE & JACK OF CALIFORNIA,

Appellants,

vs.

PYROIL SALES COMPANY, INC.,

Appellees.

APPELLEE'S BRIEF.

The official report of the opinion of the Supreme Court of California is in 5 Cal. (2) 784, 55 Pac. (2d) 194. (Statement as to Jurisdiction, 13, 14.) The court based its decision in this case upon the authority of *Max Factor & Co., etc.* v. *Kunsman,* 5 Cal. (2) 446, 55 Pac. (2d) 177, (See the Transcript of Record in Case No. 79 October term 1936 at p. 24, *et seq.*) which was consolidated below with the case at bar.

The judgment to be reviewed was entered on February 28, 1936 (R. 9, 10) and modified on March 26, 1936. (R. 10.)

The jurisdiction of this court is invoked by appellant because it asserts that the Supreme Court of California erred in holding that Section 1½ of the state "Fair Trade

Act'"[1] was not repugnant to the Fourteenth Amendment of the Constitution of the United States.[2]

I.

THE STATUTE IN ISSUE.

The Fair Trade Act of the State of California, as originally passed in 1931, reads:

> An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name.
>
> *The People of the State of California do enact as follows:*
>
> SECTION 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California by reason of any of the following provisions which may be contained in such contract:
>
> 1. That the buyer will not resell such commodity except at the price stipulated by the vendor.
>
> 2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.
>
> Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

---

[1] (Cal. Stats. 1933, ch. 260, p. 793; Deering's Codes, Laws and Constitutional Amendments of California, 1933 Supplement, Act. 8782, p. 2396.)

[2] Section 1½ was added in 1933, to the Act as passed in 1931 (Cal. Stats. 1931, ch. 278, p. 583; Deering's Gen. Laws, Act. 8782, p. 4910).

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

SEC. 2. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

SEC. 3. The following terms, as used in this act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

SEC. 4. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

SEC. 5. This Act may be known and cited as the "Fair trade act."

Approved May 8, 1931
Effective August 14, 1931

Section 1½, passed in 1933, reads:

An Act to add a new section to the "Fair Trade Act" to be number 1½, relating to unfair competition.

The People of the State of California do enact as follows:

SECTION 1. A new section is hereby added to the "Fair Trade Act" to be numbered 1½ and to read as follows:

SEC. 1½. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Approved, May 8, 1933
Effective, August 21, 1933.

II.

STATEMENT OF THE CASE.

Appellee instituted this suit in the Superior Court of the State of California in Los Angeles County on April 26, 1934. (R. 1.) Its complaint, the truth of the allegations of which stand admitted by appellant's demurrer (R. 7), shows:[3]

> Appellee (hereinafter in this summary referred to as plaintiff) is a California corporation with its principal place of business in the County of Los Angeles. (R. 1.) It is the exclusive distributor, in a designated California territory, of Pyroil. (R. 1.) The warehousing, distribution and marketing of Pyroil is the sole and only business of plaintiff. (R. 5.) Pyroil is a patented lubricant composed only of the finest lubricating elements. (R. 2.)
>
> It is identified by distinctive trade-marks, names, labels and copyrights. (R. 1.) Appellee has the exclusive right to the use, in said territory, of said trademarks, names, labels and copyrights. (R. 1, 2.) Pyroil for several years has been advertised, in national publications, such as The Saturday Evening Post, Time, Maclean's (Canada), over the radio, at automobile races, in dryrun tests and by many others means. (R. 2.) Pyroil enjoys, and for several years has enjoyed, a good reputation among dealers, retailers and consumers. (R. 2.)
>
> The Pyroil Company of La Crosse, Wisconsin, the

[3] Appellant's summary of the material allegations of the complaint does not state: that plaintiff has the exclusive right to the use, in a designated territory, of the trade-marks, names, labels and copyrights identifying Pyroil (R. 1, 2); that the warehousing, distribution and marketing of Pyroil is the sole and only business of plaintiff (R. 5); that plaintiff refuses to sell its products to dealers and retailers who do not execute the contracts (R. 4); and that defendant obtained the product against plaintiff's will. (R. 4.)

manufacturer, ships its Pyroil products from its factories to California where it warehouses said products and shipments in bonded warehouses, and plaintiff obtains Pyroil from such bonded warehouses, in turn warehousing the same at plaintiff's local points of distribution and marketing. (R. 2.)

There has developed in the automobile accessory trade in California a practice of cutting the price of well-established and advertised commodities, well known to the public, and identified by distinctive trade-marks, names, labels and copyrights; such products and such cut prices were and are used as so-called "leaders" or "loss leaders" to attract people and prospective purchasers into automobile accessory establishments (R. 2), depending upon those so attracted to make purchases of other goods and similar articles which yield sufficiently large profits to make up for losses involved in such cut prices. (R. 3.)

Plaintiff, to protect itself and the public against such injurious and uneconomic practices, recognized by the Fair Trade Act, adopted a system of doing business which consisted of entering into contracts with dealers in its territory, obligating the latter to sell Pyroil only to consumers at specified prices. (R. 3.)

These prices are fair and reasonable and practically all dealers and retailers in plaintiff's territory have executed such contracts with plaintiff (R. 3.) Plaintiff refuses to sell its products to dealers and retailers who do not execute such contracts. (R. 4.)

As a result of such contracts and method of merchandising: plaintiff enjoys a reasonable profit in the sale of its products, immunity from injurious price-cutting and unobstructed distribution; the public has benefited through reasonable prices and high quality enabled by consequent volume production, and dealers obtain a reasonable compensation for their services. (R. 3.)

The defendant operates six retail stores in the cities of Los Angeles, Glendale, Huntington Park and Long Beach, County of Los Angeles, State of California. (R. 4.) Defendant, with the purpose of interfering with, and disrupting, plaintiff's said contracts and business, has knowingly and willfully advertised, offered for sale and sold said Pyroil products at less than the prices stipulated in said contracts. (R. 4.)

In so doing, the defendant knew of the said contracts, and, previously to such advertising, offering for sale and selling by defendant, it has always had an opportunity to purchase said products on the same terms and conditions as other retailers and dealers, but had not done so, and obtained said products in ways unknown to plaintiff and against plaintiff's will. (R. 4.)

Specifically, defendant has so advertised, offered for sale and sold Pyroil in the original sealed lithographed and trade-marked containers at the cut prices of 49c and 69c on the pint size, the established price being $1.00, and at 89c and $1.19 on the quart size, the established price being $1.75. (R. 4, 5.) Defendant's cut price sales have continued and are continuing at the time of the filing of this complaint. (R. 5.)

The said willful acts of the defendant: have induced, coerced and forced other dealers and retailers who have executed contracts with plaintiff to cancel, and threaten to cancel, the same and to refuse to accept further deliveries of Pyroil from plaintiff; have induced the public to believe that Pyroil products are not worth the price at which they are nationally advertised and fixed by the manufacturer; made it impossible for other dealers to market the same at the fixed and advertised prices; and caused said dealers to threaten to discontinue the sale of Pyroil. (R. 5.) Each and all of the acts complained of are continuous and continuing in their nature. (R. 6.)

Defendant's continuance of the marketing of Pyroil

at such cut prices will produce great and irreparable injury to plaintiff; the wrongs complained of imminently peril and immediately threaten devastation of plaintiff's business, destruction of its good will, and multiple breaches, violations and cancellations of its said contracts. (R. 5.)

It would be extremely difficult to ascertain the amount of compensation which would afford adequate relief to plaintiff for loss of sales, destruction of its business and the good will pertaining thereto; pecuniary compensation would not afford adequate relief to plaintiff; restraint is necessary to prevent a multiplicity of judicial proceedings; plaintiff has suffered and will suffer great and irreparable injury for which there is no adequate remedy at law. (R. 5, 6.)

Plaintiff prays for an injunction restraining the defendant from selling Pyroil products in the designated California territory except in the original lithographed and sealed containers, bearing the trade-mark, label, name and copyright of the manufacturer and at prices established by the plaintiff and fixed by the manufacturer. (R. 6.)

On May 2, 1934, defendant demurred to the complaint on the ground that the Fair Trade Act is void and unconstitutional as being contrary to Section 1 of Article Fourteen of the Amendments to the Constitution of the United States and of certain provisions of the Constitution of the State of California. (R. 7.)

On July 13, 1934, the trial court entered judgment for defendant, dismissing plaintiff's complaint. (R. 8.) This judgment was based upon the trial court's sustaining of defendant's demurrer without leave to amend.

On March 26, 1936, the Supreme Court of California reversed the trial court and ordered it to enter judgment for the plaintiff as prayed. (R. 10.)

III.

QUESTION PRESENTED.

The sole question presented by this appeal is whether or not, in its enactment of Section 1½ of the Fair Trade Act, the legislature of the State of California exceeded the limitations of any provision of Article XIV of the Amendments to the Constitution of the United States.[4] Concretely the question is, can a state create a civil cause of action and confer upon its courts jurisdiction to entertain it?

IV.

SUMMARY OF ARGUMENT.

Business experience which may be judicially noticed by this court, and the admitted facts of this case (R. 2, 3, 5), demonstrate that property rights in good-will symbolized by trade-marks, brands and names, may be misappropriated and seriously injured, by persons who do not own them, through "leader" or cut-price sales featuring such marks. As early as 1909, the common law of California and, in 1931, the state legislature, recognizing this truth, sanctioned contracts stipulating resale prices on such commodities.

The implications of the common law and the express provisions of the Fair Trade Act, as passed in 1931, are that these contracts are valid and enforceable provided: (1) Such commodities are identified by trade-marks, brands or names; (2) are in fair and open competition with others of the same general class; and (3) that such contracts are not made between competitors (*i. e.*, horizontally).

Business experience, and the admitted facts of this case,

[4] Appellant's statement of the question presented (Appellant's Brief, p. 9) assumes that the statute empowers "private persons in their absolute and uncontrolled discretion to fix the selling price of all ordinary commodities owned and offered for sale by another in the ordinary course of retail business merely because the commodities bear the producer's trade mark, name or brand." Determination of the constitutional question will, in part, require examination to see if that assumption, and its broad implications, are correct.

further demonstrate that a manufacturer's or distributor's use of such contracts, coupled with the exercise of every legal right to confine distribution to signers, are inadequate to prevent the misappropriation of, and damage to, good-will resulting from price cutting on branded commodities covered by such contracts. The damage and misappropriation result in this manner:

> The non-contracting price cutter, despite all lawful efforts to prevent it, contrives to obtain supplies of the commodity. Free of the restraint of any contract, he advertises and sells at less than the prices established thereby. This conduct, known in the trade as "leader" or "bait" selling, attracts patronage to the cutter's store by creating the false impression that since he undersells this particular commodity, identified by a trade name and a standard price, he sells other commodities at similar low prices.
>
> In addition to this subtle fraud upon consumers, his cut price sales induce breaches of the lawful contracts, incite retaliatory (and a vicious circle of) cutting, and cheapen the product in the public mind. The ultimate result is to prevent his competitors from earning a reasonable profit in the sale of the commodity and the consequent impairment of the manufacturer's or distributor's ability to find a market for the product. These consequences all flow from a single and fundamental cause—the price cutter has used and traded upon a name he does not own and has done so against the owner's will.

Section 1½ of the California Fair Trade Act, the constitutionality of which is the sole issue before the court, declares "wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price" stipulated in such contracts, whether by a party or not, to be "unfair competition * * * actionable at the suit of any person damaged thereby."

The essence of the statute, therefore, is that it defines a species of unfair competition and permits access to the

civil courts of the state for redress or prevention. The statute deals with questions which are intrinsically economic, not legal, and which are the proper subject of the state's law making power. Further, Section 1½ is a valid declaration of the public policy of the State of California to afford additional protection to property rights, created by it, in trade-marks, brands and names. And, as a statutory development of the law of unfair competition, Section 1½ frees California commerce from abuses in the sale of goods identified by trade-marks, brands and names.

Section 1½ is neither a legislative attempt to fix prices, nor a delegation of the right to do so. Nothing in it prevents a merchant from selling any product at any price he chooses in closing out stock or if he detaches, removes or obliterates the trade-mark, brand or name with which alone the statute is concerned and which is not the dealer's property but is the producer's. The statute, therefore, does no more than permit the owner of property effectively to impose restrictions upon uses of it by strangers, which damage or destroy it.

The validity of the statute is indicated by expressions of this court and by sound analogy to common law principles, such as the tort of inducing breach of contract obligations and equitable servitudes upon real property. The application of these common law principles often has the same restrictive effects upon liberty of person and property as those features of the statute which form the chief basis of appellant's contention that it is unconstitutional.

Tested in the light of the facts before the court and by well-settled rules of constitutional construction, Section 1½ of the California Fair Trade Act violates no provision of the Constitution of the United States.[5]

---

[5] Appellee concurs fully with, and respectfully refers the court to, the brief of appellees in *Kunsman* v. *Max Factor & Co.*, No. 79 October term, 1936, for a more extensive and somewhat different presentation of the constitutional question.

V.

ARGUMENT.

I. SECTION 1½ OF THE CALIFORNIA FAIR TRADE ACT IS AN APPROPRIATE EXERCISE OF LEGISLATIVE POWER IN FURTHERANCE OF A PROPER LEGISLATIVE PURPOSE.

A. The statute affords an effective means of accomplishing the economic objective to which it relates.

The facts before the court in this case are a particularization of common experience in the distribution of commodities identified by a trade-mark, brand or name.[6] The common experience is this:

> A manufacturer produces a product to be marketed in a competitive field. He gives that product a trade-mark or a distinctive name. Such mark of identification, his property, becomes the symbol by which his product is distinguished from his competitors'.
>
> By a course of dealing over a period of years, including extensive advertising, his product achieves a public acceptance and demand. His trade-mark or brand has become inseparably associated with that acceptance and demand. It has become valuable to him as the symbol of his good will. It has become valuable to middlemen because it has given them a ready market. The mark of identification has become valuable to the public as a convenient means of designating the product, its source and its substance, enabling purchasers to exercise a freedom of choice which is the essence of fair competition.
>
> To promote distribution of the product, standard resale prices have been advertised and established by

[6] See the appendix to appellees' brief in *Kunsman* v. *Max Factor & Co.*

lawful contracts with dealers who sell it. These prices are fair and reasonable. Virtually all dealers enter into such contracts. All constantly have a fair and equal opportunity to purchase the product upon like terms. Dealers who do not desire to sign contracts are refused supplies of the product, so far as the producer and the distributors have it in their power.

This system of distribution has profited the producer by resulting in extensive sales. It has brought him the valuable support of retail distributors who have been thus assured of a reasonable profit for their services. The consuming public has been protected against exploitation, not only by the admitted reasonableness of the prices, but also because of its freedom and opportunity to choose competing products.

Despite every legal effort to confine retail distribution to dealers who agree to maintain prices, a few dealers successfully contrive to obtain the product. They then proceed to advertise and sell it at cut prices. Their purpose is to attract customers by creating the false impression that, because they sell this particular product at a price substantially less than that for which it may be obtained elsewhere, they sell all other products at correspondingly low prices. As a matter of fact, such dealers depend upon the very customers so attracted to make purchases of other goods which yield sufficiently large profits to recoup for the sales of the particular product at cut prices.

The results of this practice of the few dealers are, so far as a particular product is concerned, far reaching and disastrous. The great majority of dealers lose incentive to sell it. If they maintain the established price, they do not get the business. If they meet the cut price, their sales bring no reasonable return and invite deeper cutting in reprisal. The consuming public has been misled and the product cheapened in its eyes. The good will connected with the product is

seriously impaired, if not destroyed. Dealers who have signed the price maintenance contracts break or cancel them. All dealers have lost the valuable asset of profitable sales of the product in any volume comparable to that which existed before the price-cutting by the few.

A few dealers have thus, by deliberate appropriation of a name which does not belong to them, damaged all persons who have a legitimate property or trade right in it.

Section 1½ of the California Fair Trade Act does no more than permit access to the civil courts of California for relief against such misappropriation of trade names and such interference with contract rights. Since, both as a practical and legal matter, it is impossible for a producer, try as he may, to keep the products bearing his name out of the hands of dealers who refuse or fail to sign his contracts, Section 1½ provides the sole means of protecting his contract system and his good will against "bait" advertising and selling.

B. Price maintenance contracts of the character before the court in this case are valid under both the statutory and common law of the State of California.

The California Fair Trade Act, as passed in 1931, is, in all substantial particulars simply a statutory duplication of the common law of the state. As early as 1909, the Supreme Court of California approved a contract requiring a retailer to sell olive oil, identified by the producer's name and copyrighted designs on the containers, at prices stipulated by the producer.

Grogan v. *Chaffee,* 156 Cal. 611, 105 Pac. 745.

In 1912, the California Supreme Court held that the manufacturer of Ghirardelli's Ground Chocolate had a

right of action, as a third party beneficiary, against a retailer who sold the trade-marked product in violation of the retailer's contract with his wholesaler to maintain the prices specified by the manufacturer.[7]

D. Ghirardelli Co. v. *Hunsicker,* 164 Cal. 355, 128 Pac. 1041.

The California Supreme Court has described the Fair Trade Act's authorization of price maintenance contracts as merely embodying "* * * a rule of law well settled in this state." (Statement As to Jurisdiction, pages 30, 31.)

C. Section 1½ of the California Fair Trade Act is not a legislative attempt to fix prices; it is a declaration of the State's policy to afford adequate protection to property rights in trade-marks, brands and names and a statutory development of the law of unfair competition.

1. Section 1½ is merely a specification of acts constituting unfair competition; it describes a willful tort, and makes it actionable in a civil proceeding.

It is important to note these features of the California Fair Trade Act:

a. Its terms do not embrace bulk commodities. It is limited to products which bear the trade-mark, brand or name of the producer or owner.

b. It is limited to products sold in free and open competition with other products of the same general class.

c. Contracts between producers, and between distributors, are not allowed. The agreements to maintain prices must be "vertical," not "horizontal"; that is, they may be between the producer and the wholesaler or retailer, or between the wholesaler and

[7] Compare Section 1, sub-section (2) of the California Fair Trade Act.

the retailer, but they may not be between producers, nor wholesalers, nor retailers.

d. If a dealer no longer wishes to trade upon the name of a commodity distributed under the Act, he may sell it at any price he chooses. Section 2, subsection 1, gives this right "* * * in closing out the owner's stock for the purpose of discontinuing delivery of any such product."

e. It prohibits nothing; it commands nothing; it is purely permissive. Section 1 of the Act allows a producer or distributor if he chooses to do so, to enter into contracts with distributors of goods bearing his trade-mark, brand or name, establishing resale prices, to protect his distribution and good will, and to bring to his distributors and the consuming public the benefits which flow from stabilized prices. Section 1½ protects such a system of distribution from destruction at the hands of persons who refuse to sign such contracts but who nevertheless trade upon the trade-mark, brand or name. Section 1½ applies only when such persons act "willfully and knowingly." (It is generally, and is shown by the record in this case to have been, impossible to keep the goods out of the hands of "cut-rate" dealers.)

f. It provides no penalties. It merely allows a civil proceeding for redress to be brought by any person who is damaged by the acts which are described as unfair competition. The nature of such redress is not specified, and presumably it would consist of such remedy as a court of law or equity would deem just under the particular circumstances of the case.

Naturally the California Fair Trade Act applies only to the State of California, since state statutes have no extra-territorial force,[8] and the state, in providing for a civil

[8] *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347. at 357.

suit, must be presumed to have intended to confer jurisdiction upon its own courts.[9]

Since the statute refers only to a commodity "which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity," it would obviously be inapplicable where the trade-mark brand or name is removed, detached, or otherwise dispensed with in the advertising and sale of any product.

In the light of these considerations, Section 1½ may well be paraphrased as follows:

> "Where a person deals in a product which bears the trade-mark, brand, or name of another, and utilizes such trade-mark, brand, or name in advertising or selling the product, and willfully and knowingly, to the damage of others, advertises or sells the product at a price less than that which he knows has been established in lawful contracts, he thereby competes unfairly; and any person who has suffered injury as a result thereof may sue him in the courts of California to obtain such redress, legal or equitable, as the courts may deem just under the particular circumstances of the case."

In other words, Section 1½ is merely a specification of acts constituting unfair competition. It describes a willful tort, and makes it actionable in a civil proceeding at the instance of a person who can show legal injury caused

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[9] This court said in *Arizona Copper Co.* v. *Hammer*, 250 U. S. 400, 426, in upholding the employers liability law of Arizona:

> "And it amounts to a contradiction of terms to say that in submitting a controversy between litigants to the established courts, there to be tried according to long-established modes and with a constitutional jury to determine the issues of fact and assess compensatory damages, there is a denial of 'due process of law'."

thereby. It does no more than open the courts of California for redress against acts which it is the public policy of the State of California to regard as unfair competition.

2. Section 1½ of the California Fair Trade Act is not a legislative attempt to fix prices.

This section of the Act is concerned with price only incidentally. It neither fixes prices nor requires that prices be fixed. It is purely permissive. Its purpose is to protect lawful contracts from being frustrated, and to safeguard property rights which emanate from trade-marks, brands and names.

To be sure, where resort is had to the permissive features of the Act, price is affected, but only as an incident to the broader purpose of protecting trade-marks, brands and names, and lawful contracts. The California Supreme Court observed in this regard (Transcript in No. 79, pp. 36-38):

> "As already pointed out, this statute does not aim primarily at regulating prices, but at protecting the property and contract rights of the manufacturer, producer, distributor and retailer.
>
> • • • • •
>
> The statute, as its title indicates, by preventing price-cutting, is aimed at protecting these valuable property and contract rights of the manufacturer or producer—rights just as valuable and just as much entitled to protection as the right of the retailer, who is attempting, by exercising his claimed right of freedom of action, to injure the property and contract rights of the manufacturer or producer. The statute, in other words, does not merely prohibit price-cutting in order to regulate prices, but prohibits price-cutting in an attempt to protect the validly acquired rights of others. • • •"

It is significant that there is nothing in the California Fair Trade Act which prevents a merchant from selling a product at any price he chooses, providing he detaches, removes, or otherwise dispenses with the trade-mark, brand, or name of the producer. In so far as the product is a merely physical thing, to which the merchant has acquired title, his liberty remains untouched by Section 1½. Thus it clearly appears that the statute is not primarily concerned with regulation of prices. The legislature has merely declared that competition which is carried on by selling trade-marked or branded products at less than the prices which the merchant knows have been established in lawful price-maintenance contracts, is unfair competition.

When we recall, as this court has repeatedly held, that trade-mark property owes its very existence to state law, that the states alone can define and protect trade-marks within their borders, and the substantive law of trade-marks is wholly a state matter,[10] it does not seem logical to assert that the State of California cannot provide for relief against injurious practices relating to trade-marked goods. Moreover, when we consider the importance of the trade-mark or brand to the salability of the product, and that the merchant is trading upon something that he did not create, and that by his action he is doing something which injures and discredits the trade-mark or brand, to the detriment of the owner of it, other merchants and the consuming public, the reasonableness of this legislation becomes apparent.

The court is not called upon to determine the conditions under which price-limitations may be placed upon the alienation of property, *as tangible property.* The question

[10] *American Steel Foundries Co.* v. *Robertson,* 269 U. S. 372, 381; *U. S. Printing & Lithographing Co.* v. *Griggs,* 279 U. S. 156, 158; *American Trading Co.* v. *Heacock,* 285 U. S. 247, 256, 258.

does not deal with the conditions which may circumscribe the sale of property, but merely with the conditions which may be attached to the use of the trade-mark, brand or name under which the property may be sold.

Appellant's insistence that the measure is a price-fixing statute and that it goes beyond the evils aimed at are all grounded in the error of assuming that the statute relates to commodities rather than to trade-marks, brands and names.

In its brief and in the appendix thereto, appellant makes much of the fact that costs of conducting businesses vary. The California legislature was undoubtedly aware of that. But it must be presumed to have determined that impelling reasons for this legislation weighed more heavily and justified limitations upon the use of trade-marks, brands and names. To repeat, the statute does not prevent the sale of any commodity at any price the owner chooses. It simply prevents use of trade-marks, brands or names under circumstances deemed by the legislature to constitute unfair competition. If the owner of the chattel to be sold avoids (by obliteration or otherwise) the use of such marks of identification, the statute in no way interferes with his selling at prices of his own choosing.

Appellant frequently refers to Seligman and Love: Price Cutting and Price Maintenance (Harper & Brothers, 1932), but appellant does not refer to the conclusion reached by the authors as follows:

> "We are accordingly led to the conclusion that the evil with which price maintenance seeks to cope, namely, the evil of certain forms of cut prices, has no justification in either economics or ethics. Price maintenance as a general social policy is to be judged not by the seeming antagonism between consumers as a class and producers as a class, nor, on the other hand, by the ostensible conflict between the two sections of the pro-

ducing class, the manufacturers and the retailers. For, in the first place, there is no such antagonism between producers and consumers. Consumers themselves will in the long run be benefited by the adoption of price maintenance in the sense that, as we have seen, the welfare of the consumer depends ultimately on the prosperity of the producer. And in the second place, there is no such antagonism between manufacturers as a class and retailers as a class. The real conflict is found in the attitude of the few retailers who think that their interests would be jeopardized by the adoption of price maintenance, and whose success at present is being achieved at the cost of other more fair-minded competitors. When we consider that against this comparatively limited class stand the bulk of the retailers, the mass of the manufacturers and the permanent interests of the consumers, we are forced to the conclusion that in principle at least price maintenance is a logical inference from the doctrine of true competition, and that the denial of price maintenance denotes a perpetuation of the pseudo-competition from which modern American life is suffering. Those forms of price cutting which involve the 'leader' policy, the sale below cost, and the necessity of devious methods of securing supplies from others than the producers themselves, however profitable to the individual, are open to criticism as constituting destructive and not constructive competition, as being economically unsound and therefore ethically unjust. Price cutting of this kind, in short, is a form of unfair competition; price maintenance is a step toward fair competition." (pp. 268, 269.)

"We conclude accordingly that, apart from the particular form it may assume, the general principle of resale-price maintenance is legitimate. That type of price cutting which we have studied in this volume is a form of unfair competition; price maintenance is a step toward fair competition. It is economically defensible,

and therefore ethically desirable. The adoption of resale-price maintenance as a general principle will mean on the whole a step forward in American business life." (p. 276.)

To argue that because a person has bought and paid for an article which bears the trade-mark, brand or name of another, he has a constitutional right to do with it whatever he pleases, regardless of the effect of his conduct upon that other, or upon a public interest in the preservation of the latter's good will, is to urge a new and strange doctrine. The whole law of trade-marks and of unfair competition is a negation of such argument. The philosophy which underlies it commends itself neither to a sense of fairness nor to business expediency.

3. Section 1½ of the California Fair Trade Act is consistent with the development of the common law of unfair competition; its underlying principles have their counterpart in the common law; its terms are clear, definite and reasonable.

This Court has long recognized the general doctrine that unfair competition is the genus of which the technical law of trade-marks is one of the species. Relief against unfair competition is of common law origin, and may be considered as a branch of the law of torts. The concept of unfair competition has now been extended to include any conduct which artificially interferes with good will, and good will is no more than reasonable trade expectancy.

We have already referred to the practical results of such competition as appellant claims the constitutional right to indulge in—the tendency to disrupt contract relations; the deception of the public by the "leader" or "bait" device; the cheapening of the product in the public mind, damaging good will; the prevention of success-

ful distribution by making the product unprofitable to most dealers; the ultimate and inevitable deterioration of quality or the driving of the product from the market.

It cannot even be plausibly argued that the law of unfair competition must remain static, unable to cope with this situation.[11]

Nor should we suppose that it could reasonably be contended that a sovereign state is constitutionally forbidden to declare that its public policy regards conduct such as this statute is aimed at, as unfair competition, and to entertain in its courts civil actions for such redress as those courts may find appropriate. This, we respectfully submit, is the only question which this court is now called upon to decide.

Common Law Analogies.

Independently of any statute, the imposition of restrictions upon alienation of real property by contract between vendor and vendee, such restrictions being binding upon subsequent purchasers, are old in the law. (*Tulk* v. *Moxhay*, 2 Ph. 774 (1848).)

The possibility of extending such equitable servitudes to chattels, and the common law basis for such a possibility, are explored in an able article by Professor Zechariah Chafee, Jr., entitled "Equitable Servitudes on Chattels" published in XLI Harvard Law Review 945 (June, 1928).

[11] "Novelty is not a constitutional objection, since under constitutional forms of government each state may have a legislative body endowed with authority to change the law. In what respects it shall be changed, and to what extent, is in the main confided to the several states; and it is to be presumed that their Legislatures, being chosen by the people, understand and correctly appreciate their needs." (*Arizona Copper Co.* v. *Hammer*, 250 U. S. 400, 419.)

Professor Chafee points out that restraints on the alienation of land, binding sub-purchasers, are common and that similar restraints as to chattels are quite within the powers of courts of equity, should practical considerations require their assertion.

Professor Chafee reviews the problem from the historical standpoint, and believes that courts of equity have the necessary power if they choose to use it. Certainly, therefore, statutes having a similar effect are not arbitrary or without legal precedent.

In *Bitterman* v. *Louisville and Nashville Railroad Company,* 207 U. S. 205, this court, by holding that the non-transfer and forfeiture clauses in a railroad ticket were binding not only upon the original purchaser but also upon any other person who might have acquired the ticket, very strongly suggested the propriety of imposing a servitude upon chattels, the effect of which is to bind successive vendees.

This court from its inception has often upheld state statutes (See footnote 18, *post*) which limit absolute freedom to contract concerning, and to alienate, property, even though such statutes were not in line with the historic antecedents and common law analogies pointed out by Professor Chafee. Many such statutes went far beyond the California Fair Trade Act, in that they introduced entirely new economic experiments, often the exact opposite of the previous common law.

Another common law principle, consonant with the purpose and effect of Section 1½, is the doctrine of tortious interference with contract relations. *Lumley* v. *Gye,* 2 El. & Bl. 216 (1853) was the basis for the establishment, in nearly all common law jurisdictions, of the principle that the law will not permit a person willfully to induce an-

other to breach a contract, even though the means of inducement, standing alone, might be "legal."[12]

The acts against which Section 1½ permit redress might, independently of their admitted and willful interference with lawful contracts and their injury to good will, be perfectly proper. But that is no reason for saying that, in those instances where they have anti-social concomitants, they may not be curbed.

The California Supreme Court recognized, in passing upon Section 1½, this common law analogy, saying:

> "• • • The common law, without statutory authorization, long recognized that unjustifiable interference with contract rights of others constituted a tort. • • • The statute here involved, in a large measure, merely extends that common law doctrine to the transactions enumerated in the statute."

(Statement as to Jurisdiction, page 30.)

These principles have also been recognized by this court in passing upon state legislation. *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Association*, 276 U. S. 71, upheld a Kentucky statute which authorized cooperative marketing contracts and penalized anyone who knowingly induced violation of them, Mr. Justice McReynolds saying:

> "Counsel maintain that the Bingham Act takes from the warehouse company the right to carry on business in the usual way by accepting and selling the tobacco of those who voluntarily seek its services and thus unduly abridges its liberty. Undoubtedly the stat-

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[12] The leading cases are collected in: Carpenter, Interference with Contract Relations, 41 Harvard Law Review 728 (1928), and Sayre, Inducing Breach of Contract, 36 Harvard Law Review 663 (1923). This court applied and approved the common law doctrine in *Angle* v. *Chicago, St. Paul, Minneapolis, and Omaha Railway Company*, 151 U. S. 1.

ute does prohibit and penalize action not theretofore so restricted and to that extent interferes with freedom. *But this is done to protect certain contracts which the legislature deemed of great importance to the public and peculiarly subject to invasion. We need not determine whether the liberty protected by the Constitution includes the right to induce a breach of contract between others for the aggrandizement of the intermeddler—to violate the nice sense of right which honorable traders ought to observe.*

* * * * * *

Viewing all the circumstances, it is impossible for us to say that the legislature of Kentucky could not treat marketing contracts between the Association and its members as of a separate class, provide against probable interference therewith, and to that extent limit the sometime action of warehousemen." (276 U. S. 71 at pp. 91 *et seq.;* italics added.)

The Terms of the Statute Are Clear and Reasonable.

While, as has been seen, the Fair Trade Act is not a price fixing measure, it is incidentally and operatively concerned with prices. A study of the statute discloses that the California legislature has carefully and effectively circumscribed its application and operation. The limitations upon the permission granted are obviously calculated to prevent harm to the public which might result from legalizing exorbitant prices or monopoly upon anything but the rights pertaining to a trade-mark or name.

The fact that the prices maintainable under Section 1½ originate in private contracts rather than by the action of governmental authority does not render the measure less reasonable. It renders it less rigid. The fixing of a

definite price, or minimum price, for all of a category of commodities (such as milk in the Nebbia case), by the action of a governmental body far more definitely compels the public to pay higher prices, and far more clearly prevents competition, than does the plan of merchandising authorized by the Fair Trade Act.

Under the Fair Trade Act every producer of an identified product must continue to reckon with the price charged by his competitor, he is under no compulsion to establish any price and natural laws of supply and demand prevent any economically significant establishment of unreasonable prices.

The validity of Section 1½ is not affected by saying that in extreme, imaginary and improbable fact conditions, its enforcement might work hardship or might be difficult. This court has frequently held that such difficulties are irrelevant and that determination of constitutional questions should be based primarily upon the facts before the court in a particular case.[13]

This case comes to this court upon a judgment entered after the sustaining of a demurrer to the complaint without leave to amend. The facts alleged, for the purpose of this proceeding, are admitted to be true. They clearly show that appellant is not beset with any imaginary complications and hypothetical difficulties.

Moreover, the act itself provides all the safeguards against injustice afforded by orderly procedure in civil courts, where, naturally, every defense is available and

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[13] *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. *Gorieb* v. *Fox*, 274 U. S. 603. *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165. *Yazoo and Mississippi Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217. *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571.

without drastic penalties to coerce compliance.[14] The trial courts can deal with special situations as they may arise in specific cases.

These considerations, it is submitted, point the error of such suppositious contentions of appellant that the statute is arbitrary because the moving party may discriminate in proceeding or not proceeding against dealers who cut the price,[15] or because different contracts might stipulate different prices, or because a stranger to any interest in the trade-mark might attempt to take advantage of the statute, or because the mark may not really symbolize a valuable good will, and all other similar fanciful objections which presume unjust applications of the statute by courts of justice.

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[14] Section 307 of the California Code of Civil Procedure provides:

> "There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs."

Thus, it is the settled law of the state that:

> "* * * Under the code system of practice a defendant is allowed to set up as many defenses as he may have, regardless of the question as to whether they are of a legal or equitable nature, because the distinction which exists under the common-law system between actions at law and suits in equity and the forms thereof have been abolished. Whether a party is to seek his remedy or avail himself of his defense in law or equity is no longer a question, for we have but one forum, which combines all the powers of a court of law and a court of chancery, and exercises both through the same forms, and may exercise both in the same action."
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> (1 California Jurisprudence 313.)

[15] The fact that a statute conferring rights does not compel their exercise at all, or permits exercise in some instances and not others, certainly does not make the statute unconstitutional. The same argument could be made against any statute which prescribes civil rights and remedies.

II. THE CONSTITUTION OF THE UNITED STATES DOES NOT PROHIBIT A STATE FROM MAKING ITS COURTS ACCESSIBLE TO A PRODUCER OR DISTRIBUTOR FOR THE ENFORCEMENT OF RESALE PRICES ON GOODS IDENTIFIED BY HIS NAME, ESPECIALLY WHERE SUCH ACCESS IS FOR THE PROTECTION OF RIGHTS DERIVED FROM LAWFUL CONTRACTS AND FROM THE OWNERSHIP OF TRADE-MARKS, BRANDS AND NAMES.

A. The presumption of constitutionality is particularly applicable to this statute.

Statutes often deal, as does Section 1½, with economic questions concerning which there is a wide divergence of public and expert opinion. But the wisdom of policy underlying statutes is not the test of their constitutionality.[16] The courts are not called upon to resolve controversies in economics.

"Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." (*Nebbia* v. *New York*, 291 U. S. 502, at pages 537, 538. Italics added.)

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[16] Courts of last resort in California, Illinois and New York have passed upon the precise question now before this court. The Supreme Courts of California and Illinois (*Max Factor & Co.* v. *Kunsman*, 5 Cal. (2) 446; 55 Pac. (2) 177; *Joseph Triner Corporation* v. *McNeil*, 363 Ill. 559, 2 N. E. (2) 929, *Seagram* v. *Old Dearborn*, 363 Ill. 610, 2 N. E. (2) 940, holding the statute constitutional, refused to follow the New York Court of Appeals decision that the statute was unconstitutional (*Doubleday, Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272, 199 N. E. 409). The Vice Chancellor in New Jersey agreed with the New York Court of Appeals, *Johnson & Johnson* v. *Weisbard*, 120 N. J. Eq. 314, 184 Atl. 783.

B. Section 1½ of the California Fair Trade Act does not deprive any person of liberty or property without due process of law.

Section 1½ of the California Act is attacked on the ground that it involves the deprivation of property and liberty without due process of law, the theory being that when a man buys goods bearing Pyroil trade-marks the property is his and to limit his right to dispose of it in any way he sees fit, deprives him of his property and liberty. This seems to us to involve an obvious fallacy which analysis will at once expose.

When appellant buys Pyroil, it may be admitted that it owns the contents of the container and the container itself, but the thing that makes Pyroil salable, namely, the trade-mark on the container, appellant does not own. The purpose of the Act as expressed in its title is to "protect trade-mark owners, distributors * * * against injurious and uneconomic practices, etc."

Appellant does not own the good will symbolized by the Pyroil trade-mark.

The property right in California, to the Pyroil trade-mark, is the creation of the law of California. By Section 1½ of the Fair Trade Act the State of California specifies acts regarded as injurious to the trade-mark property which owes its existence to the law of that State. It is merely giving additional protection to rights which it originally brought into being.[17]

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[17] Cal. Civil Code, Sec. 655:

"There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the good will of a business, trade-marks and signs, and of rights created or granted by statute."

The nature of a trade-mark is such that its owner cannot keep it in possession but must necessarily entrust its use to thousands of dealers and, if it is a valuable trade-mark, it passes into the hands of millions of consumers. Despite the physical parting with the tangible commodities and the transfer of title to them, ownership of the mark identifying such commodities does not pass with their physical transfer. Legislation therefore dealing with the treatment which must be given a trade-mark by one who is not the owner, into whose hands goods bearing the mark may come, does not deprive such persons of their property or restrict them in the use of it, since the title to the *commodity* bearing a trade-mark and title to the *trade-mark* itself are separate and distinct.

The unmistakable purpose of the California statute under discussion here is not to prevent a dealer from using what he owns (the commodity itself), but to prevent willful injury to a third person's property in the trade-mark which the dealer does not own. This is a proper legislative object and since the means adopted are reasonable and effective, Section 1½ meets all requirements of due process.[18]

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[18] Thus this court has held that a legislature may:

Fix the charges made by the owners of grain warehouses and elevators (*Munn* v. *Illinois* (1876), 94 U. S. 113; *Brass* v. *North Dakota* (1894), 153 U. S. 391; *Budd* v. *New York* (1892), 143 U. S. 517).

Fix the charges made by insurance companies (*German Alliance Ins. Co.* v. *Lewis* (1914), 233 U. S. 389).

Limit agents' commissions on fire insurance policies (*O'Gorman* v. *Hartford Insurance Co.* (1931), 282 U. S. 251).

Require miners to be paid per ton of coal unscreened instead of screened (*McLean* v. *Arkansas* (1909), 211 U. S. 539; *Rail & River Coal Co.* v. *Yaple* (1915), 236 U. S. 338).

Require employers who pay their men in store orders to redeem them in cash (*Knoxville Iron Co.* v. *Harbison* (1901), 183 U. S. 13; *Dayton Coal & I. Co.* v. *Barton* (1901), 183 U. S. 23; *Keokee Cons. Coke Co.* v. *Taylor* (1914), 234 U. S. 224).

Fix the fees chargeable by attorneys appearing for injured

Whether the provisions of Section 1½ of the Fair Trade Act are wise or unwise is not an issue. As this court said in *Northern Securities Co.* v. *United States,* 193 U. S. 197, 337:

> "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine."

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employees before Workmen's Compensation Commissions (*Yeiser* v. *Dysart* (1925), 267 U. S. 540).

Fix the rate of pay for overtime work (*Bunting* v. *Oregon* (1917), 243 U. S. 426).

Regulate attorneys' fees for preparing and prosecuting pension claims (*Frisbie* v. *U. S.* (1895), 157 U. S. 160).

Fix the time within which the services of employees must be paid for, and provide for semi-monthly payments of wages (*Erie R. R. Co.* v. *William* (1914), 233 U. S. 685).

Establish maximum hours of labor for men (*Holden* v. *Hardy* (1898), 169 U. S. 366).

Establish maximum hours of labor for women (*Muller* v. *Oregon* (1908), 208 U. S. 412; *Miller* v. *Wilson* (1915), 236 U. S. 373).

Prohibit the payment of wages in advance (*Patterson* v. *Bark Eudora* (1903), 190 U. S. 169; *Strathearn Steamship Co.* v. *Dillon* (1920), 252 U. S. 348).

Require that loaves of bread of only a certain size be sold (*Schmidinger* v. *Chicago* (1913), 226 U. S. 578).

Prohibit the sale of berries in any containers except in those of prescribed dimensions (*Pacific States Box and Basket Co.* v. *White* (1935), 296 U. S. 176).

Fix the maximum rate of interest chargeable on loans (*Griffith* v. *Connecticut* (1910), 218 U. S. 563).

Regulate sales of merchandise in bulk (*Lemieux* v. *Young,* (1909), 211 U. S. 489).

Regulate the net weight of retail packages (*Armour* v. *North Dakota* (1916), 240 U. S. 510).

Declare sales of commodities on margin or for future delivery void (*Booth* v. *Illinois* (1902), 184 U. S. 425; *Brodnax* v. *Missouri* (1911), 219 U. S. 285).

Forbid unfair competition by the charging of lower prices

And as the court declared in *Nebbia* v. *New York*, 291 U. S. 502, 537:

> "*And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory, it does not lie with the courts to determine that the rule is unwise.* With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. (Italics added.)
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> • • • • • •
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> (Page 532)
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> The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago."

There have been strong intimations by this court that

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in one locality than those exacted in another (*Central Lumber Co.* v. *South Dakota* (1912), 226 U. S. 157).

Forbid giving trade inducements to purchasers, by imposing a prohibitive tax on merchants giving such inducements (*Rast* v. *Van Deman & L. Co.* (1916), 240 U. S. 342).

Authorize a board to fix the retail price of milk (*Nebbia* v. *New York* (1934), 291 U. S. 502).

Prohibit interference with cooperative marketing contracts (*Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-operative Marketing Association* (1928), 276 U. S. 71).

Authorize the Secretary of Agriculture to fix charges made by marketing agencies in stockyards (*Tagg Bros.* v. *U. S.* (1930), 280 U. S. 420).

legislation, such as that now before it, is valid. In *Dr. Miles Medical Company* v. *John D. Park & Sons Company,* 220 U. S. 373, 405, this court passed upon a system of price maintenance, quite similar to that in the case at bar, but attempted without the sanction of any statute whatsoever. It is not without significance to the present issue that the court, speaking through Mr. Justice Hughes, remarked:

> "Nor can the manufacturer by rule and notice, *in the absence of contract or statutory right,* even though the restriction be known to purchasers, fix prices for future sales." (Italics added.)

In *Boston Store* v. *American Graphophone Co.,* 246 U. S. 8, 25, Chief Justice White said:

> "Moreover, so far as the argument proceeds upon the assumption of the grave disaster which must come to the holders of patent rights and articles made under them from the future application of the doctrine which the cases establish, it must be apparent that if the forebodings are real the remedy for them is to be found, not in an attempt judicially to correct doctrines which by reiterated decisions have become conclusively fixed, but in invoking the curative power of legislation."[19]

The general validity of both state and federal anti-trust legislation has been so well established by repeated decisions of this court that citation of authority is pointless. That fact has significant pertinency to the statute before the court in this case. Anti-trust statutes are, almost without exception, the declaration of a policy prohibiting agreements to maintain prices. The restraint placed by such statutes upon freedom of contract, person, and property has been even more extensive than that alleged by the appellant in this case to result from the operation of Section 1½ of the Fair Trade Act.

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[19] Compare the concurring opinion of Mr. Justice Brandeis at page 27.

Since, in support of one public policy, a state legislature may absolutely forbid price maintenance, it seems no more than reasonable that it may, in support of another public policy, permit price maintenance and provide means for making it effective. Public policy is always subject to change.[20]

Section 1½ has been assailed as being an unconstitutional delegation of legislative power. In so far as the argument pertains to the Constitution of the State of California, this court is not concerned with it in this appeal, for the Supreme Court of a state is the final arbiter on a question of the conflict between a state statute and a state constitution.[21] The Supreme Court of California held that there is nothing in this act that is contrary to the Constitution of California. (R. 42.) Also, it is obvious that there is not involved any question of the application of Article 1, Section 1, of the Federal Constitution, which vests all legislative powers of the United States in the Congress, or Article 1, Section 8, of the Federal Constitution, which empowers the Congress to make all laws necessary and proper for carrying into execution its enumerated powers.

However, a delegation of legislative power may amount to a denial of due process of law.[22] But to be a denial of due process, the legislation must be clearly arbitrary, unreasonable or capricious. Thus, in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, Mr. Justice Sutherland characterized the delegation there involved as "clearly arbitrary". Likewise, in *Eubank* v. *Richmond*, 226 U. S. 137, the legislation under attack was condemned because it was, in the

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[20] *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 55, 58, 59.

[21] *Merchants' and Mfrs.' Nat Bank* v. *Pennsylvania*, 167 U. S. 461. *Michigan Central R. Co.* v. *Powers*, 201 U. S. 245.

[22] *Washington* v. *Roberge*, 278 U. S. 116 (14th Amendment). *Eubank* v. *Richmond*, 226 U. S. 137 (14th Amendment). *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (5th Amendment).

words of Mr. Justice McKenna, "an unreasonable exercise of the police power."

Therefore, even if Section 1½ of the California Fair Trade Act could be construed as involving a delegation of legislative power to private individuals, it would nevertheless withstand the test of constitutionality because it is not an unreasonable, arbitrary, or capricious measure, inappropriate for the accomplishment of any legitimate legislative end. The entire discussion of the statute which we have presented in this brief is pertinent to this point.

The argument that Section 1½ delegates legislative power to private individuals proceeds from a misconception of its nature and purpose. The contention might have some cogency if Section 1½ were in its essence a price-fixing measure. But it is not. It does not become so merely because it recognizes the simple economic truth that there is a relationship between stability of price in trade-marked goods and the good will attached to the trade-mark by which the goods are distinguished from competing merchandise; nor because it declares that the willful cutting of prices below those established in lawful contracts is a variety of unfair competition, for which the courts of the state may grant a civil remedy to a person injured thereby.

The Federal Constitution does not expressly forbid state legislatures from delegating authority. By construction, delegation is only forbidden when it is of such a nature as to violate due process.[23]

Perhaps the most obvious answer, as far as this case is concerned, to the assertion that the California Fair Trade Act is unconstitutional because it "delegates" to private persons the right to fix resale prices on their trade-marked goods, is a simple denial. In California, contracts estab-

[23] *Dreyer* v. *Illinois*, 187 U. S. 71, 83. *Montana Co.* v. *St. Louis Mining Co.*, 152 U. S. 160, 165.

lishing resale prices were lawful before the Fair Trade Act was passed.[24] So far as the right to make such contracts is concerned, since it existed before the Act, the Act does not delegate anything to anybody.

With respect to Section 1½, the Supreme Court of California regarded it merely as a statutory statement of existing law, based on *Lumley* v. *Gye*, 2 El. & Bl. 216, that interference with contracts is actionable. So it seems to us that the argument that there is delegation of any power by this Act is fantastic. Where a thing existed before the statute, the statute cannot "delegate" it.

Moreover there is a great distinction between delegating what is in effect law-making power to a board or code authority which determines liability *a priori* and providing access to regularly constituted civil courts to redress an intentional act resulting in damage. It cannot be a delegation of legislative power for the legislature of California to confer on the courts of California jurisdiction to try an issue in a civil suit. Every case brought in the California courts under the authority of Section 1½ will be decided on its own facts and every defense will be available. It seems to us irrational to argue that one who is given his day in court in a civil proceeding and the right of appeal, is denied due process.

It seems equally irrational to say that a statute which does not set up a standard applicable to every conceivable case is void for the reason that judicial legislation is required to enforce it. In *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 69, where a similar attack was made on the general terms of the Sherman Act, Mr. Justice White said:

> "So far as the arguments proceed upon the conception that in view of the generality of the statute it is

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[24] *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745 (1909). *D. Ghirardelli Co.* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041 (1912).

not susceptible of being enforced by the courts because it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. The statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions therefore but insist that, consistently with the fundamental principles of due process of law, it never can be left to the judiciary to decide whether in a given case particular acts come within a generic statutory provision. But to reduce the propositions, however, to this their final meaning makes it clear that in substance they deny the existence of essential legislative authority and challenge the right of the judiciary to perform duties which that department of the government has exerted from the beginning. This is so clear as to require no elaboration. Yet, let us demonstrate that which needs no demonstration, by a few obvious examples. Take for instance the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition, depending upon wrongful intent. Take questions of fraud. Consider the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce."

If a statute should declare the right of a land owner to post a sign on his property, declaring the hours of the day during which no one might pass over the land and defining passage over the land during the forbidden hours as trespass, we suppose that no one would seriously contend that there was a delegation of legislative power simply because the statute left the owner free to designate the particular hours.

We do not suppose that appellant would question the

validity of a statute which provided that the owner of any chattel shall be free to sell it at any price he chooses. That is the very thing for which appellant here contends. Yet appellant's argument would invalidate such a statute as involving a delegation of legislative power because it leaves the owner of the chattel, a private individual, free to fix his own sale price.

Section 1½ is not a delegation of power, it is the conferring of a private right and providing a civil remedy for willful violation of it. It is only "delegation of power" in the sense that the creation of any property right is. Every property right involves control over, or restraint of, others. This control is delegated in the sense that it is secured or protected by the state. But it is a fundamental error to characterize this power, as appellant does, as law making. There is no more delegation of legislative power involved in the protection of the right to make lawful contracts effective and trade-marks secure, than in the exercise of the common law right of an owner to sell his property at his own price, or the right of a manufacturer, as the principal, to establish resale prices by agency contracts with 21,000 dealers throughout the country (*U. S.* v. *General Electric Co.*, 272 U. S. 476) or the right of a producer to contract for resale prices on trade-marked goods which existed in California before the Fair Trade Act was passed.

Appellant, in characterizing the statute as an unconstitutional delegation of legislative power, seeks to bring it within the rule of such cases as *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116; *Eubank* v. *Richmond*, 226 U. S. 137; and *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190. The key to the doctrine of all such cases is found in the arbitrary nature of the statutes involved plus their attempted transfer of authority ordinarily exercised by the

legislative branch of the government. Thus in the cited cases, each of the statutes:

1. Transferred to an individual or individuals the power to prescribe rules of conduct, *i. e.*, to legislate;

2. Provided for the enforcement of such rules by penalties, or the equivalent of penalties, unrelated to the extent of the injury, if any, caused by the violation of such rules;

3. Afforded no opportunity for adequate review by the courts.

Section 1½ of the Fair Trade Act is not a transfer of the power to prescribe rules of conduct; it is an exercise of that power by the California legislature. The statute here imposes no penalties and it makes injury a condition precedent to relief. The very right to relief provided by the statute here, is no more than to give access to courts of justice with all the attendant safeguards of fair and orderly procedure as well as appellate review.

Section 1½ simply authorizes a trade-mark owner to resort to the courts, if he so desires, for the protection of lawful contracts and to safeguard the good will represented by his trade-mark, brand or name. It permits him to bring a suit for unfair competition against anyone who would wilfully[25] injure his rights in such contracts and symbols,—to go into court if he wants to and prove his case if he can. To call this a delegation of legislative power would equally condemn all laws by which legislatures authorize men to adopt appropriate measures to protect their property rights against the willful conduct of others which may impair their value.[26]

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[25] To be actionable under Section 1½ the acts must be done "wilfully and knowingly," and result in legal damage. Compare *Fairmont Creamery* v. *Minnesota*, 274 U. S. 1, with *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, and *State* v. *Bridgeman & Russell*, 117 Minn. 186.

[26] See article "The Constitutionality of the New York Fair Trade Act," Virginia Law Review, March, 1936, pp. 556, 560, 561.

C. Section 1½ of the California Fair Trade Act does not deny to any person the equal protection of the laws.

It is contended that Section 1½ denies equal protection of the laws by discriminating between trade-marked and non-trade-marked commodities, and between the manufacturers or dealers of each.

So far as the claim of discrimination relates to manufacturers, appellant is not in a position to complain, for it is not alleged, nor does appellant claim to be, a manufacturer. A litigant may question a statute's validity only when and so far as it is being, or about to be, applied to his disadvantage.[27]

The Fair Trade Act is designed to apply to "articles of standard quality under a distinguished trade-mark, brand or name". It applies only to articles which are "in fair and open competition with commodities of the same general class produced by others". The act, therefore, embraces within its terms a large but distinct class of articles, which are fairly differentiated from all other articles. Obviously, the legislature has seen fit to classify all commodities into two great groups: (1) those which bear no distinguishing trade-mark, brand or name of the producer or owner, and (2) those which do. It has further determined that the latter group requires, for reasons not applicable to the other, legislative safeguards in the interests of the "owners, distributors and the public".

There are inherently sound and controlling reasons for limiting the provisions of the statute to commodities identified by trade-marks, brands and names. An effort to maintain a resale price upon goods not so distinguished would be futile and impossible of practical execution. If the pro-

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[27] *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217. *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571.

ducer or distributor of a quantity of grain attempted to establish a price binding upon subsequent vendees, the very nature of the commodity would frustrate the attempt. Being in free and open competition with other articles in no way distinguishable, there would be no practical means of imposing such a limitation except by packaging it or identifying it in a manner which would meet the requirements of the Fair Trade Act. It cannot be reasonably said that the legislature has exceeded its powers in making such a classification, or that such a classification is wholly unreasonable, arbitrary or capricious, in view of the compelling fact that the legislature's purpose could not be carried out under any different classification.

In *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, this Court laid down the rules by which this question must be tested. In that case, there was a state statute directed against pumping from wells bored or drilled into rock, but not against pumping from wells not penetrating rock; and also against pumping for the purpose of collecting gas and vending it apart from the waters, but not against pumping for other purposes. The contention was made that the statute was arbitrary in its classification, and denied the equal protection of the laws to those whom it affected. The court denied this contention, and held the statute constitutional, laying down the following fundamental rules (p. 78):

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with

mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

In *Keokee Consolidated Coke Co.* v. *Taylor,* 234 U. S. 224, Mr. Justice Holmes said, at p. 227, of the statute prohibiting the payment by mining and manufacturing companies of wages in other than lawful money:

"It is more pressed that the act discriminates unconstitutionally against certain classes. But while there are differences of opinion as to the degree and kind of discrimination permitted by the 14th Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the legislature to judge unless the case is very clear. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 81. *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 160. *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144.

The suggestion that others besides mining and manufacturing companies may keep shops and pay their workmen with orders on themselves for merchandise is not enough to overthrow a law that must be presumed to be deemed by the legislature coextensive with the practical need."

See also *Gorieb* v. *Fox,* 274 U. S. 603.

VI.

Conclusion.

Section 1½ of the California Fair Trade Act is a valid exercise of the legislative power of the state, reasonably designed to accomplish a proper legislative object. It is a statutory development of the law of unfair competition. It affords legitimate protection to property rights in trademarks, brands and names. It violates no provision of the Constitution of the United States.

The judgment of the Supreme Court of the State of California should be affirmed.

Respectfully submitted,

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